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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

NO. 74-1276

RICHARD B. COTTEN,

Petitioner,

v.

THE HONORABLE, JAMES R. SCHLESINGER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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BRIEF FOR PETITIONER

Petitioner respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Fourth Circuit entered on December 11, 1974.

CITATION TO OPINION BELOW

The Ruling of the District Court for the Eastern District of Virginia is printed in Appendix A. The

opinion of the Court of Appeals for the Fourth Circuit is reproduced in Appendix B. The order denying the Motion for Rehearing is reproduced in Appendix C.

JURISDICTION

The judgment of the Court of Appeals denying the petition for Rehearing was entered on 11 December 1974. The Court of Appeals refused to stay its mandate for an additional 30 days on January 13, 1975. On March 12, 1975 this court granted an extension of time to and including April 10, 1975 to file a Petition for Certiorari. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

(1) Did the Court of Appeals err in affirming the District Court's denial of plaintiffs' standing to sue, after plaintiffs had shown that they were adversely affected and aggrieved by Secretary's alleged unlawful actions?

(2) Did the Court of Appeals err in affirming the District Court's denial of plaintiffs' standing to sue, without first determining that the Secretary's challenged actions were lawful?

(3) Should the District Judge have recused himself?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

The primary issue in this case is the statutory question of whether or not Section 21 of the Foreign Military Sales Act of 1968, (22 U.S.C. 2761) authorizes the Secretary of Defense to make foreign sales of military equipment specifically procured for, and used by, the active and reserve forces of the United States. Only in the event that the statutory question should be decided in favor of such sales would the secondary issue challenging the Foreign Military Sales Act on constitutional grounds arise.

The principal constitutional provisions involved in the secondary issue are Article I, sections 7, and section 8, clauses 12 through 16; Article II, Section 2, Clause 1; and Article IV, Section 4; all, together with Articles I, II, V, and IX of the Bill of Rights.

A tertiary issue arises with respect to the District Judge's failure to recuse himself in disregard of the provisions of Title 28, U.S.C. 144.

STATEMENT OF THE CASE

Plaintiffs on October 26, 1973, brought an action in the District Court for the Eastern District of Virginia for declaratory relief and an injunction to restrain Respondent, The Secretary of Defense, from unlawfully (i.e., under color of Section 21 of the Foreign Military Sales Act of 1968) expending, selling, lending, leasing, transferring or giving away to one or more foreign powers, F-4 Phantom jets, and other aircraft, tanks, military and naval equipment that belonged to, and

constituted, essential equipment of the active units and tactical commands of the United States Armed Forces. Plaintiffs alleged that, contrary to both statute and the constitution, government property procured out of monies appropriated by Congress for valid purposes, (i.e., to provide defense articles for the use of the armed forces of the United States) had been misapplied without legal sanction and used instead to provide defense articles for the Armed Forces of the State of Israel.

Respondent admitted that some of the defense articles transferred to Israel were taken from the inventories of the active and reserve units of the United States Armed Forces, and from the mobilization reserve of the United States Armed Forces. Respondent contended that Section 21 of the Foreign Military Sales Act of 1968 gave him the authority to make the challenged transfers.

Plaintiffs responded that all sales or leases of U. S. Armed Forces military equipment had to be authorized specifically by law, and cited the Lend Lease Act of 1941[1] as the only historical precedent for a transfer of Armed Forces weapons to a foreign power. Thus, issue was joined.

PLAINTIFFS INVOLVED

(1) This action was initiated by Dr. William Pierce, a physicist, at one time employed at the Las Alamos research facility in New Mexico and thereafter as a

[1] P.L. 11, 77th Congress, 1st Sess. Mar. 11, 1941.

College professor at a Western University. Dr. Pierce, alarmed by what he viewed as alien subversive influences corrupting the American polity, abandoned his academic pursuits in order to devote his full attention to a new "calling," that of awakening the "Gentile" segment of the U.S. citizenry to the deadly dangers that he believed America faced. He took over from its founders, the day-to-day direction of the "National Youth Alliance" and the editorship of its publications.

(2) Mr. Richard Cotten is the founder and publisher of "Conservative Viewpoint," a publication emphasizing fundamentalist Christian values, with commentary devoted largely to an analysis of the impact that current political movements for 'social change' portend for the traditional life style and values of the average American. Mr. Cotten believes that sinister interests have a deliberate aim to alienate the majority of Americans from their own government. Mr. Cotten, from time-to-time has made radio broadcasts and is an active supporter of the National Documentation Institute, an organization whose efforts, to date, have been largely concerned with the publication of information relating to narcotic drugs, drug cults, and to the exposure of drug apologists. Mr. Cotten has, in the past, clashed with the Anti-Defamation League of B'nai B'rith. He now regards it as one of his principal tasks to "expose" the League as a smear organization and Zionist front whose first, if not only loyalty is to the State of Israel and the "Zionist apparatus."

(3) The "Committee to Restore the Constitution" is a Colorado based organization chiefly concerned with what it perceives as a conspiratorial and subversive

movement that is attempting to impose regional governance upon the American people through the means of a faceless, non-elected bureaucracy that strives to usurp the prerogatives of the local electorate and the functions of local officials. A special effort is directed against "land Use" legislation. Under the direction of retired Lt. Colonel Arch Roberts, the organization has placed emphasis on maintaining a strong national defense. It has won the support of a large number of Armed Forces personnel. Six former flag officers and three ex-Congressmen sit on its Advisory Board. The legal counsel of the Committee is the District Attorney in a Western State with a strong bent for, and considerable reputation in, the field of Constitutional law.

(4) The Action Committee on Arab-American Relations is a New York based committee representing several Arab and Middle-East oriented organizations and individuals. It publishes tracts and papers opposed to Zionist or Israeli aggrandisements in formerly Arab lands in Palestine, Syria and Egypt. Dr. Mehti, a distinguished legal scholar, and the chairman of the organization was recently hospitalized; the victim of a severe beating, purportedly by extremist members of the Jewish Defense League.

PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Soon after filing a petition for an injunction, plaintiffs submitted an application to convene a

statutory Three Judge District Court. The application was directed through then Chief Judge Oren Lewis to Judge Haynesworth, Chief Judge of the United States Court of Appeals for the Fourth Circuit. Thereafter, and before action was taken by Judge Lewis on the application, a Motion was filed requesting Chief Judge Lewis to defer consideration of plaintiffs application until after respondent's answer was filed. Plaintiffs' purpose was clear. If Respondent conceded that he acted pursuant to Section 21 of the Foreign Military Sales Act, as was expected, then the question of statutory interpretation could be handled by a single judge and a resolution on that issue expedited. Only if the statute were to be found to permit respondent's challanged actions, would the need for a three judge court be required to rule on a constitutional challenge to the statute.

Respondent answered plaintiffs' petition by filing a Motion to Dismiss, in which he conceded that he relied upon Section 21 of the Military Sales Act of 1968. The statutory issue (and the alternative constitutional question) thereby was clearly placed before the District Court together with the pending application for a three judge court.

A hearing was held by Judge Albert Bryan, Jr. on February 8, 1974 on Respondent's Motion to Dismiss and Plaintiffs' Motion for Summary Judgment. The Judge Granted Respondent's Motion to Dismiss, holding that plaintiffs had no standing to sue either as citizens or as taxpayers because the *Flast*[1] case required:

> An allegation that the challenged enactment exceeds specific constitutional limitations imposed

[1] Flast v. Cohen, 392 U.S. 83 (1968).

> on the exercise of the taxing and spending power or some other constitutional limitation on an action of Congress.

The District Judge then added his personal opinion as to plaintiffs motives in bringing the suit.

> . . . I think that the suit is merely to vent the disagreement with the *programs which are being conducted by the Congress. I feel* (sic) that *Congress is* acting within its prope. sphere and *properly enacting the aid that it is* . . . (emphasis added by petitioner.)[2]

The District Judge had made no legal finding that the Secretary's sales of active duty U.S. Armed Forces weapons were in fact permitted by the Foreign Military Sales Act or authorized by the Congress.

The District Judge added his "thought" (sic) that the matter was made moot by the subsequent enactment of Public Law 93-199, The Emergency Military Assistance Act of 1973, an act which waived, as to Israel, some of the financial provisions of the Foreign Military Sales Act, but did not authorize sales of active duty Armed Forces weaponry. The District Judge erroneously 'believed' (sic) that the request for a three-judge court had already been ruled on by Judge Lewis. (Presumably it must be assumed, adversely.)

Plaintiffs thereupon Moved the Court to Reconsider Plaintiffs' Motion for Summary Judgment and to act upon the pending application for a three-judge court, plaintiffs not having abandoned their constitutional challenge in the alternative. Plaintiffs also filed a Motion for Change of Judge on the grounds of bias,

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[2] Appendix A.

and supported it with two affidavits.[3] Additional supplementary memorandum were filed together with a petition for award of attorney's fees *nunc pro tunc*. Judge Bryan took the case again, circumventing Chief Judge Lewis who still held the application for a three judge court, and without issuing a written order, summarily denied all the motions. A timely appeal followed.

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Briefs were filed by both sides and argument heard on the seven issues appealed to the Court.[4] After argument the court affirmed the judgment of the District Court on the sole ground that plaintiffs lacked standing to sue. The Court's opinion was silent on all other questions raised. On December 11, 1975 Motion for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

(1) A writ should be granted in this case because the United States Court of Appeals for the Fourth Circuit

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[3] Appendices D and E.

[4] These issues were (1) standing (2) mootness (3) Meaning of Term "Stocks" in Title 22 USC 2761 (4) Summary Judgment (5) Constitutional Issues in the alternative (6) Whether judge should have recused himself? (7) Whether attorneys fees should be awarded?

has rendered a decision on a federal question in a way in conflict with applicable decisions of this court, and it has sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision. The court below misinterpreted the judgments of this court as rendered in *Flast v. Cohen*, 392 U.S. 83 (1968); *United States v. Richardson*, _____ U.S. _____, 42 U.S. L.W. 5076 (U.S. June 25, 1974); and, *Schlesinger v. Reservists Committee to Stop the War*, _____ U.S. _____, 42 U.S.L.W. 5088 (U.S. June 25, 1974). In addition, the trial court, as reference to its Ruling conclusively demonstrates, misunderstood the question presented to it. The judgment of the Court of Appeals likewise taunts reason and precedent in that it is at variance with numerous decisions of this court that uphold the right of citizens and taxpayers to bring suit to enjoin federal officials from pursuing clear breaches of the law that result in tangible, personal and measurable harm; harm that cannot be rectified by resort to the political process. Petitioners submit that their case is distinguished from the type of suits brought by citizens or taxpayers where the sovereign is challenged with respect to taking appropriate, reasonable, and discretionary legislative or executive action, and where no significant legal right of a citizen can be shown to have been impinged. In such cases, standing to sue has properly been denied.

(2) A writ should be granted in this case because the Court of Appeals erred in affirming the District Court's denial of standing, after plaintiffs had clearly shown that their rights as citizens and taxpayers were adversely affected by the unlawful actions of respondent. The plaintiffs had shown that the statutory scheme Congress

had evolved was clearly designed to protect the interests of the public, for whom government property was held in trust. Many safeguards have been built into appropriations legislation to assure that government property would be used solely for the purpose for which funds had been appropriated.[5] The provisions of Section 504(b) of the Foreign Military Sales Act, for example, are especially pertinent in this regard. It requires the President to:

> Adopt procedures for programming and budgeting which bring military assistance programs into competition for financial support with other activities and programs of the Department of Defense.

The Secretary's actions were violative of all these Congressionally sanctioned statutory safeguards. This court has held that where statutes are concerned, as opposed to mere complaints made of the use of tax monies, the trend of the law is definitely toward enlargement of the class of persons who may protest administrative action. *Association of Data Processing Service Organizations, Inc. v. Camp*, 377 U.S. 150, 153 (1970).

(3) A writ should be granted in this case because the District Court dismissed plaintiffs suit for lack of standing without first making a determination that the Secretary's action was lawful. The question of statutory protection of a class of citizens requires an evaluation of legislative intent, but express authority providing for judicial review of, and the monitoring of, the administrative process need not be given by statute, for

[5] i.e., Title 31 U.S.C. Secs. 628 and 665.

there is a presumption of reviewability. *Stark v. Wickard*, 321 U.S. 288 (1944), *Leedom v. Kyne*, 358 U.S. 184 (1958). In *Leedom*, the legislative history rather clearly indicated that Congress had not intended reviewability of agency action. Nevertheless, this Court concluded that one should not, "lightly infer" a congressional intention to preclude review entirely, especially if plaintiff sought to vindicate his "rights" against "agency action taken in excess of delegated powers." *Leedom*, supra, at 190. This doctrine is a logical extension of the rule derived from *Stark*, supra at 508:

> . . . The authority for a judicial examination of the validity of (the Secretary's) action is found in the existence of courts and the intent of Congress as deduced from statutes and precedents . . .

The development of a systematic approach to reviewability reflected in *Stark* and extended in *Leedom* culminated in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). In that case drug manufacturers sought preenforcement review of an order issued by the Commissioner of Food and Drugs. The Court of Appeals had held that preenforcement review was unauthorized. Reversing, the Supreme Court examined the line of cases deriving from *Stark* and concluded that a court should conclude that judicial review of final agency action is legislatively authorized absent "clear and convincing" evidence of a legislative intention to preclude review. If there is no clear showing of legislative preclusion, the presumption in favor of review will be conclusive. *Abbott*, supra, at 141.

Mr. Justice Brennan has wisely observed, that under this approach the question of standing to sue and the

question of subject matter jurisdiction or reviewability are analytically indistinct. Elements of both questions are to be resolved, not by reference to "legal interests" or special statutory provisions for review, but by a single, broad evaluation of legislative purpose. A court may entertain suits in accordance with the presumptively authorized judicial function of furthering legislative objectives. *Barlow v. Collins*, 397 U.S. 159, 169.

In cases where administrative discretion does not preclude review entirely, the relevant consideration is whether or not the contested conduct reflects an abuse of discretion, given the facts and the range of permissible administrative choice. The mere fact of the existence of a discretionary element does not preclude review, for relevant statutes contain standards to guide administrative conduct.

Petitioner submits that the purpose of foreign assistance legislation would be frustrated by the preclusion of judicial review, particularly where an administrative determination respecting the national security would fly in the face of responsible military opinion, and be in disregard of weighty evidence that such (unauthorized) sales would not only fail to further the national security of the United States, but would be, as they have since proven to be, wholly detrimental.

Clearly, the question of balancing the benefits of judicial review against the Executive's interest in procedural independence is one worthy of studied, rather than of perfunctory reflection. There is but a single valid consideration that ought to deter a conscientious court from extending and enhancing citizens' opportunity to secure judicial review of an

administrative determination affecting the deeply felt interests of a large and significant class of citizens. That single consideration is the fear that an expansion of judicial review will ultimately lead to judicial excess. But a cautious, and vigilant judge, all the more should not be deterred, for otherwise the field will be surrendered to the imprudent and incautious, or those willing to truckle to the most strident voice. The ultimate remedy for judicial excess remains intact. Congress can preclude review.

Acting alone, an individual citizen can hope to win a lawsuit, though he can rarely lobby with much success. Moreover, an aggrieved individual whose interest is merely a general patriotic interest common to all members of the public is apt to be a reliable critic of errant administrators acting in defiance of statutory schemes. The courts provide today, in a world increasingly dominated by oligarchic media empires, the only significant means by which this criticism may be expressed. Additionally, the judicial remedy is apolitical and this makes it especially effective in areas where an important cause of administrative abuse is the influence exerted by private interests and pressure groups, including foreign interests, not subject to regulation. If administrators and Congressmen are captives of these interests, the courts need not be.

It is interesting to note that when Section 702 of the administrative procedure act was discussed by both the House and Senate Committees, they interpreted it to confer,

A right of review upon any person adversely

> affected in fact by agency action or aggrieved within the meaning of any statute.[6]

Plaintiffs had adequately alleged injury in fact, both economic and non-economic. Their situation fell within a "zone of interest" arguably protected by the statutory scheme. A "logical nexus" clearly linked the alleged injury to the Secretary's challenged action. Although, no primary challenge was made by taxpaying citizens that the statute (Foreign Military Sales Act) was unconstitutional, such was an alternative challenge. It is clear that by hoary precedent, the District Judge had a duty to examine the statutory question presented to him.

> While the Government enjoys sovereign immunity from suit, its officers do not share in that immunity. They are answerable as private individuals, for wrongs committed even in the course of their official work, just as a private agent is answerable for a wrong committed by him on behalf or at the command of his principal. To be sure the officer may justify his conduct by referring to the law under which he is acting. But, that raises precisely the issue whether the law does indeed authorize his conduct under the circumstances - the typical issue for judicial determination.[7]

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[6]See Sen. Doc. No. 248 79th Cong. 2d Sess. 212, 276 (1946). Also see discussion of additional legislative history in 3 KC Davis, Administrative Law Treatise: 2202 (1958). Also see Davis, "Standing-Taxpayers and others," *University of Chicago Law Review.* Vol. 35: 601 (1968).

[7]Attorney General's Commission on Administrative Procedure in Government agencies. S. Doc. No. 18, 77th Cong. 1st Sess. 80-8 (1941).

All plaintiffs sought and prayed for was:

> For an order permanently enjoining the defendant from making or authorizing any further transfers of aircraft and other war material without appropriate justification in law.

Petitioning taxpayer submits that a free people has more than a mere right, it has a duty, to keep its public servants accountable to those from whom they derive their grant of authority, their legitimacy in office, and the tax resources with which they underwrite their activities. A citizen and taxpayer, if he has such a duty, should exercise it to prevent the unlawful sale or transfer of weapons that Congress and his military leaders consider essential to the national defense! If a people has no such right then indeed, they are no longer free, and they should rise up, and establish a responsible government. It is thoroughly destructive of a citizen's selfless efforts to ensure the survival of his own homeland not to be permitted to exercise such a right!

> The Government of the United States has been *emphatically* termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[8] (emphasis added by Petitioner.)

Citizens and taxpayers have a legitimate interest that the laws appertaining to, and affecting the national defense of the United States, above all other laws, be faithfully executed. The military is hardly in a position

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[8] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

to oppose the Secretary of Defense. Citizens and taxpayers should feel alarm and trepidation when a civilian bureaucrat, no matter how distinguished he may be in his civilian specialty, acts in utter disregard of the expressions of concern of the nation's highest military leaders![9] Public expressions of concern have steadily mounted. They are there for those willing to look beyond the bland facade of the mass media.[10]

Petitioner submits, that in the long and honorable history of our great country, the light and beacon of free men everywhere, there has never been a legal issue of equivalent national importance, magnitude, and dire urgency dropped into the lap of a single judge, and, then, been brushed off with less reflection and unconcern for the very real consequences his action portended for world peace, international goodwill, the national interest, respect for law, national prosperity, and ultimately, freedom, for all men, everywhere.

Petitioner submits that he had directly challenged specific illegal dispositions of government property and

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[9]On the same day that this suit was filed, Mr. John Chancellor, a highly respected news commentator, reported on N.B.C. news (Washington Channel 4) that "high military sources that declined to be named" were deeply troubled because some of the Armed Forces weapons transferred to Israel "seriously jeopardized the defense capability of the United States."

[10]The National Council of the Reserve Officers Association unanimously passed a resolution "urging the Congress of the United States to seek to stop the apparently *accelerated diversion* and withdrawal of mission essential unit equipment from the reserve Components." *The Officer*, p. 8, April 1975. (Emphasis added).

he had identified several challenged dispositions with great particularity. The deprivation of property rights, including rights to property held in trust by others for one's benefit, are rights recognized by the Constitution of the United States under the Fifth Amendment right to due process of law. It has wisely been held that Congress cannot destroy a constitutionally protected property right by the simple expedient of withdrawing jurisdiction from every court in which suits for enforcement could be brought.[11] Clearly, if the courts are correct in holding that Congress has no such right under the Constitution, it must follow that courts, too, lack the power to deny a constitutionally protected property right by the simple expedient of denying one standing to sue to protect that right.

(4) A writ should be granted in this case because plaintiffs were denied a fair and unbiased hearing on their Motion to Reconsider the Motion for Summary Judgment when the District Judge declined to recuse himself and the Court of Appeals failed to appreciate the significance of that fact as it related to the issues, particularly the constitutional questions raised by plaintiffs.

The ruling of the District Judge was replete with error very probably induced by bias. It reflected a presumption as to the status of plaintiffs application for a three-judge court which was without foundation, and was wholly wrong. It reflected a clearly erroneous view of the impact that the passage of P.L. 93-199 had to the statutory question presented to the court. It

[11] *Miller v. Howe Sound Mining Co.*, D.C. Wash. (1948) 77 F. Supp. 540. (Citing inter alia Ch. J. Hughes in *Graham v. Goodcell*, 282 U.S. 409, 430-431, 51 S. Ct. 186, 193-194; 75 L.Ed. 414, 415 (1930).

reflected a mistaken application of the *Flast* case irrelevant to the particular facts of plaintiffs' case. It was so at variance with the actual questions at issue as to confuse the whole subsequent standing question as it related to plaintiffs case. Even the Court of Appeals became confused!

That the judge clearly considered plaintiffs' petition and Motion for Summary Judgment in a subjective way is evidenced by reference to the judge's ruling where, without citing any reasons of findings of fact, he declared that he 'thought' plaintiffs suit was initiated "merely to vent the disagreement with the programs which are being conducted by the Congress." However, in their suit, plaintiffs had made a presumption that the Congressional statute did not allow the Secretary's action and no dispute was ever initiated by plaintiffs with respect to Congressional programs.

It was immediately recognized as a strong possibility that the judge's ruling very likely was influenced by the recent world-wide notoriety of the original plaintiff, Dr. Pierce, brought about by a scurrilous newspaper attack by the widely read Jack Anderson.

Jack Anderson's "Washington Merry-Go-Round" column of December 26, 1973 appeared in many hundreds of newspapers throughout the United States and was broadcast on national and international wire services causing said comments to appear in newspapers all over the world.

Jack Anderson knew that Dr. Pierce had filed this suit and that it was then pending in court.[12] Anderson's scurrilous attack, plaintiffs believed, was primarily

[12]Plaintiffs Affidavit, Appendix E.

intended to prejudice their suit. In any event, the publicity proved prejudicial to this action as well as to the detriment of other plaintiffs. The publicity made Dr. Pierce's motives appear to be self-serving and rooted solely in so-called anti-semitism. As a result, it affected co-plaintiffs, including your petitioner's, ability to obtain counsel of their choice, and it impaired all of plaintiffs' ability to raise legal funds to maintain this action. It had the effect of deterring other proper, and more adequately financed, parties from joining in this action. Within days of the newspaper publicity, the Internal Revenue Service, egged on by politically motivated pressure by Congressmen,[13] initiated steps to revoke the National Youth Alliance's tax exemption, and it was soon revoked. Dr. Pierce was unable to continue with the suit because he lacked finances. Since the publications of the National Youth Alliance carried no advertising and were distributed free to a very large extent, the I.R.S. action of revocation tended to serve as a chilling effect on Dr. Pierce's means of expressing his minority views to a great extent. He therefore served, and still serves, as an object lesson to others who might still share his specific concerns.

A motion for a judge to recuse himself must be based upon an alleged bias and prejudice that stems "from an extra judicial source and results in a judicial opinion on the merits on some basis other than what

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[13]Several Zionist publications advised their readers of the actions being taken by named Congressmen to get the IRS to take away Pierce's tax exemptions.

the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). Here the judge's opinion departed so widely from the issues presented by plaintiffs that, then, for the first time, did the probability of personal bias and prejudice arise. As plaintiffs showed in their affidavits, they truly believed that the judge's opinion was uttered on a basis "other than what he learned from his participation in the case."

Petitioner submits that the affidavits submitted met the requirements of the applicable statute, 18 U.S.C. 144, and the judge should have recused himself from the case.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX A

RULING ON MOTION TO DISMISS

United States District Court
for the
Eastern District of Virginia
Alexandria, Virginia

Dr. William Pierce, The Committee To Restore The Constitution, Inc., The Action Committee on Arab-American Relations, Inc. Richard B. Cotten, Plaintiffs versus The Honorable, James R. Schlesinger, Secretary of Defense Respondent	)	Civil Action No. 480-73A

RULING ON MOTION TO DISMISS

The motions to intervene have been and will be allowed, without passing on the merits of the claim you assert in your intervening petitions, and as I explained to Mr. Sykes last week, the motions that are filed by the United States will be deemed to have been

addressed to both the plaintiffs and intervenor plaintiffs.

I will hear the Government on those motions.

* * *

Insofar as the request for a three-judge court is concerned, I believe that has already been ruled on by Judge Lewis, but in any event, standing and mootness are both questions of jurisdiction and they can be and should be ruled on by a single judge before the action proceeds further. I think what may be properly considered by a single judge and whether or not to convene a three-judge court are controlled in this Circuit by *Jacobs v. Tawes*.

But treating the matter of mootness first, I [fol. 2] think the matter is made moot by the enactment of the Public Law 93-199 attached to the Government's Supplemental Memorandum, and that, as I say, is a question of jurisdiction properly considered by a single judge.

In addition to that, in the allegations of both the Complaint by the original plaintiffs, the added plaintiffs and the intervenor plaintiffs, I do not think there is set forth any standing to sue in this action either as taxpayers or otherwise. As counsel recognized in their memoranda, the question of standing is now controlled by *Flast v. Cohen*, and while the first of the two tests or prongs of the test enunciated by *Flast* may arguably be met as far as taxing and spending are concerned, *Flast* also requires an allegation that the challenged enactment exceeds specific constitutional limitations imposed on the exercise of the taxing and spending power or some other constitutional limitation on an action of Congress.

That test is not met here. I think that the suit is merely to vent the disagreement with the programs which are being conducted by the Congress. I feel that Congress is acting within its proper sphere and properly enacting the aid that it is, and that these plaintiffs either as taxpayers or otherwise have no standing to contest it.

Insofar as the "otherwise" is concerned, that is, if they bring their suit in some capacity other [fol. 3] than as taxpayers, their standing would be governed by the *Camp* case, I think where the plaintiffs fail here is that injury in fact to these plaintiffs is absent.[1]

For these reasons, the Court feels it lacks jurisdiction to entertain the action, there being no case or controversy as required by Art. III, Sec. 2, of the Constitution. The Government's motion to dismiss will be granted and the case dismissed.

Obviously, from what I have said it is apparent that the Court feels the motion for a summary judgment filed by the plaintiffs is not well taken, and that will be denied.

* * *

The foregoing is a transcript of the oral decision as announced from the bench on January 18, 1974. (Edited.)

---

[1] See also, Mottola v. Nixon, 464 F.2d 178, 181 (9th Cir. 1972) where the Court said: "... because of the contingent and speculative nature of the injury, the district court was presented with no more than a hypothetical case ... and thus lacked jurisdiction of the action under Article III, Section 2 of the Constitution."

APPENDIX B

JUDGMENT OF COURT OF APPEALS

United States Court of Appeals
For The Fourth Circuit
No. 74-1375

Dr. William Pierce, Committee
to Restore the Constitution,
Action Committee on Arab
American Relations,

Plaintiffs

Richard B. Cotten,

Appellant

Versus.

James R. Schlesinger,
Secretary of Defense

Appellee

Appeal from the United States District Court for The Eastern District of Virginia, at Alexandria

---

PER CURIAM:

Upon consideration of the record, briefs and oral argument, we conclude the district court properly dismissed this suit for lack of standing. *Flast v. Cohen*,

392 U.S. 83 (1968); *United States v. Richardson*, ____ U.S. ____, 42 U.S.L.W. 5076 (U. S. June 25, 1974); *Schlesinger v. Reservists Committee to stop the war*, ____ U.S. ____, 42 U.S.L.W. 5088 (U. S. June 25, 1974).

AFFIRMED

For The Court:
Clement F. Haynesworth
Chief Judge, Fourth Circuit

A true copy, teste:
William K. Slate II, Clerk
By Faye Chlorill
Deputy Clerk

EXHIBIT C

Order of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 74-1375

William Pierce, Committee to Restore the Constitution, Inc., Action Committee on Arab-American Relations,

Plaintiffs,

Richard B. Cotten,

Appellant,

versus

James R. Schlesinger, Secretary of Defense,

Appellee.

FILED
DEC 11 1974
WILLIAM K. SLATE, II
CLERK
[stamp]

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.

Upon consideration of the petition for rehearing in this case and with the concurrence of Judges Field and

Russell, there being no request for a poll of the full Court;

IT IS ORDERED that the petition for rehearing be, and it hereby is, denied.

FOR THE COURT:

/s/ Clement F. Haynesworth
Chief Judge, Fourth Circuit

A True Copy, T e s t e:
William K. Slate, II, Clerk
By /s/ Faye Chlorill
Deputy Clerk

APPENDIX D

Affidavit of Richard B. Cotten accompanying Motion for Change of Judge.

AFFIDAVIT

Washington)
) ss:

Richard B. Cotten, being duly sworn, deposes and says:

That he is one of plaintiffs in the case of Dr. William Pierce, et al. versus The Honorable James R. Schlesinger, Civil Action No. 480-73A, now pending in the Alexandria Division of the United States District Court for the Eastern District of Virginia. That he verily believes and charges that his honor, Albert V. Bryan, Jr., has a personal bias and prejudice against him and against his co-plaintiffs, to wit: Dr. William Pierce; The Committee to Restore the Constitution; and, The Action Committee for Arab-American Organizations, and each of them, and in favor of the defendant, the Honorable James R. Schlesinger, by reason of a bent of mind, inclination, predilection and disposition that prevents and impedes impartiality of judgment, and said Albert v. Bryan, Jr., is accordingly unable to impartially exercise the function of judge in this cause. That by reason of said personal bias or prejudice none of the plaintiffs can have a fair and impartial hearing of the

merits of their cause before him. The ground for affiant's belief is as follows:

1) That Albert v. Bryan, Jr., is a highly esteemed, experienced and knowledgable judge, widely recognized to be well versed in both statute and case law, and that it is therefore most unlikely that said judge would be apt to make errors in finding of fact and of law, or to depart from germaine issues unless such errors or departures were subconsciously prodded by a personal bias or prejudice against a party in a case, supported perhaps, but not induced, by a liberal and elitist predisposition.

2) That co-plaintiff, Dr. William Pierce, original plaintiff in this action was on December 26, 1973, the target of a cowardly, abusive, vicious, malicious and unfair attack by one Jack Anderson, a widely read and quoted columnist for the Washington Post, whose column appears in over 600 newspapers nationally. Said Anderson referred to Dr. Piece in said column as a "Nazi, anti-semite, hangman, and by clever and sly inuendo and misstatement of fact smeared and otherwise depicted Dr. Pierce as a bad and immoral character and by implication as a criminally motivated menace to a law-abiding society.

3) That a highly moral, upright, and law abiding individual such as the Honorable Judge Albert v. Bryan, Jr., is known to be, could quite clearly be expected to have a natural and strong aversion toward any person having characteristics and traits such as those attributed to Dr. Pierce by said Jack Anderson; and that despite conscious efforts not to be swayed by scurrilous journalism, a subconscious aversion and disinclination to be favorably disposed toward one with such character

traits would be a reasonable and natural consequence of the resultant notoriety.

4) That the bad character traits attributed to Dr. Pierce would have a natural tendency to rub off on such co-plaintiffs as would voluntarily associate themselves with such a "bad character," especially in an action against a highly distinguished and honorable opponent such as the defendant in this particular controversy.

5) That at a hearing held before aforesaid Albert V. Bryan, Jr., on January 18, 1974, affiant's attorney meritoriously endeavored to correct and to assuage the bad character image and notoriety which had so recently cascaded upon his client, Dr. Pierce, but he was cautioned by the Honorable Albert V. Bryan, Jr., to refrain therefrom as the notoriety of Dr. Piece was not relevant.

6) That said attorney thereupon abandoned his endeavors, perhaps without sufficient cause or reflection, but probably for tactical reasons, and he desisted.

7) As a consequence, the bad character image attributed to plaintiff, Dr. Pierce, and by association therewith, to the other co-plaintiffs remained in large part uncontroverted and uncorrected.

8) That plaintiffs in this cause have clearly shown that their action in bringing suit was an unselfish one, inspired solely by their desire to forestall and prevent the repetition of illegal, unauthorized, foolhardy and unconstitutional actions of defendant that were detrimental to the national defense and to the security of the people of these United States.

9) That plaintiffs had not made a legal issue of the foreign or domestic policies of defendant, but in fact

had striven to steer a course clear therefrom, and they had never raised before this Honorable court for its decision or ruling any issue involving the foreign or other political policy of defendant or of the present administration, or ever mentioned same unless and except insofar as such political policy had led, or was incidental, but not material, to induce defendant's challenged acts.

10) That despite plaintiffs sincere efforts not to be drawn into the irrelevant issue of political policy, the Honorable Albert V. Bryan, Jr., without finding or making reference to any pleadings, affidavits, depositions, admissions or other factual basis in support of his conclusion, ruled that plaintiffs were motivated solely or largely by the desire to engage defendant and draw him into a dispute over the administration's foreign policy in the Middle East (or words to that effect.)

11) That plaintiffs' contention that defendant's challenged actions were violative of the statutory scheme under which he purportedly acted was never faced, not even obliquely, and plaintiffs' citation of law and authority in their Motion for Summary Judgment totally undermining defendant's asserted claim that he was acting in accord with the statute was never challenged.

12) That accordingly defendant's failure to respond should have been treated as a concession by defendant that he did not act in accord with the statutory scheme, and Summary Judgment for plaintiffs clearly should have followed.

13) That the failure of the Honorable Albert V. Bryan, Jr. to perceive this most crucial turn of events,

affiant can only attribute to a vision beclouded by personal bias and prejudice against plaintiffs.

14) That affiant sincerely believes and is soundly convinced that the non-germane remarks of the Honorable Albert V. Bryan, Jr. at the conclusion of the hearing, were solely motivated by personal bias and prejudice flowing directly or indirectly from the aforesaid Anderson column or from other unflattering remarks about plaintiffs from others similarly motivated.

15) That the said remarks by the Honorable Albert V. Bryan, Jr. also apply to affiant's attorney who had stated during the hearing that he considered the plaintiffs' cause as much his own cause as the plaintiffs.

16) That the fact upon which affiant bases his belief of the personal bias and prejudice of Albert V. Bryan, Jr., antedate by approximately four weeks the hearing held on the merits of the cause, and affiant does not believe or have ground to suspect that the personal bias and prejudice which only became clear during the hearing arose because of matters occuring during the hearing on this cause.

17) Affiant further states that the Honorable Albert V. Bryan, Jr., otherwise made evident his personal bias and prejudice against plaintiffs when he had the hearing of the cause which had been set as the first civil case on the docket, delayed until late in the day, all other cases first having been heard and the courtroom thus emplied of newsmen and spectators, and that such delay was not occassioned by the excusable absence of any party, defendants attorney not being required in another courtroom, but having slipped away to wait in his office until he should be summoned.

18) Affiant further states that he verily believes that the said Honorable Albert V. Bryan, Jr., has impressions or prejudices in his mind and against plaintiffs, which it would take additional evidence to remove, and that he cannot have a fair and impartial hearing before the Honorable Albert V. Bryan, Jr., Judge of said Court and that he is entitled to have his Motion pursuant to Rule 59 heard before another United States Judge.

/s/ Richard B. Cotten
Richard B. Cotten

Subscribed and sworn to before me this 28 day of January, 1974.

s/ Margaret T. Whiston

Notary Public

My Commission Expires:
My Commission Expires Nov. 14, 1976

(stamp)

APPENDIX E

Affidavit of Dr. William Pierce
Accompanying Amendment To
Motion for Change of Judge

AFFIDAVIT OF DR. WILLIAM PIERCE

State of Virginia)
County of Arlington) ss:

FILED
JAN 28 1974
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA
[stamp]

William Pierce, being duly sworn deposes and says:

I am a plaintiff in the above described action and have read the following statement and know the contents thereof. The matters stated therein are true to my own knowledge except as to matters therein stated to be alleged upon information and belief, and that as to those matters I believe them to be true.

/s/ William Pierce
William Pierce

Subscribed and sworn to before me this 28 day of Jan. 1974.

/s/ Betty Dodson
Dep. Clerk

STATEMENT

The December 26, 1973, "Washington Merry-Go-Round" column of Jack Anderson, which was published in the WASHINGTON POST and approximately 600 other daily newspapers, maliciously defamed and libeled affiant and the National Youth Alliance (NYA), of which he is an officer.

The Anderson column asserts that the principal activity of NYA is publishing "hate literature" and that affiant is engaged in sending "hate mail," whereas neither of these assertions is true. All publications of NYA and all mail sent by affiant are of a patriotic nature and are intended to develop positive feelings of national, local, and cultural pride and solidarity in those persons to whom they are addressed.

The Anderson column implies through innuendo that affiant, in his dealings with the United States and in his other activities, has been dishonest, secretive, evasive, and illegal, whereas none of these implications is true.

Affiant has information which leads him to believe that the Anderson column was published in collusion with the Anti-Defamation League of B'nai B'rith, a Zionist organization, for the specific purpose of prejudicing this court against him in his suit now before the court. Affiant is aware of close links which existed between the Anti-Defamation League and Anderson's predecessor and former business associate, Drew Pearson, and affiant has been informed that Anderson prepared his column in collusion with Peter Crawford Reynolds, a former employee of the Institute for American Democracy, an affiliate of the Anti-Defamation League.

As a result of the defamatory and untrue publications, of said Jack Anderson, affiant believes that the Honorable Albert V. Bryan, Jr. became prejudiced against affiant and his co-plaintiffs as is more fully set forth in the affidavit of Richard B. Cotten, previously filed with the court.

/s/ William Pierce
William Pierce
Affiant

SUPREME COURT, U.S.
APR 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1276

RICHARD B. COTTEN,

Petitioner,

v.

THE HONORABLE, JAMES R. SCHLESINGER,

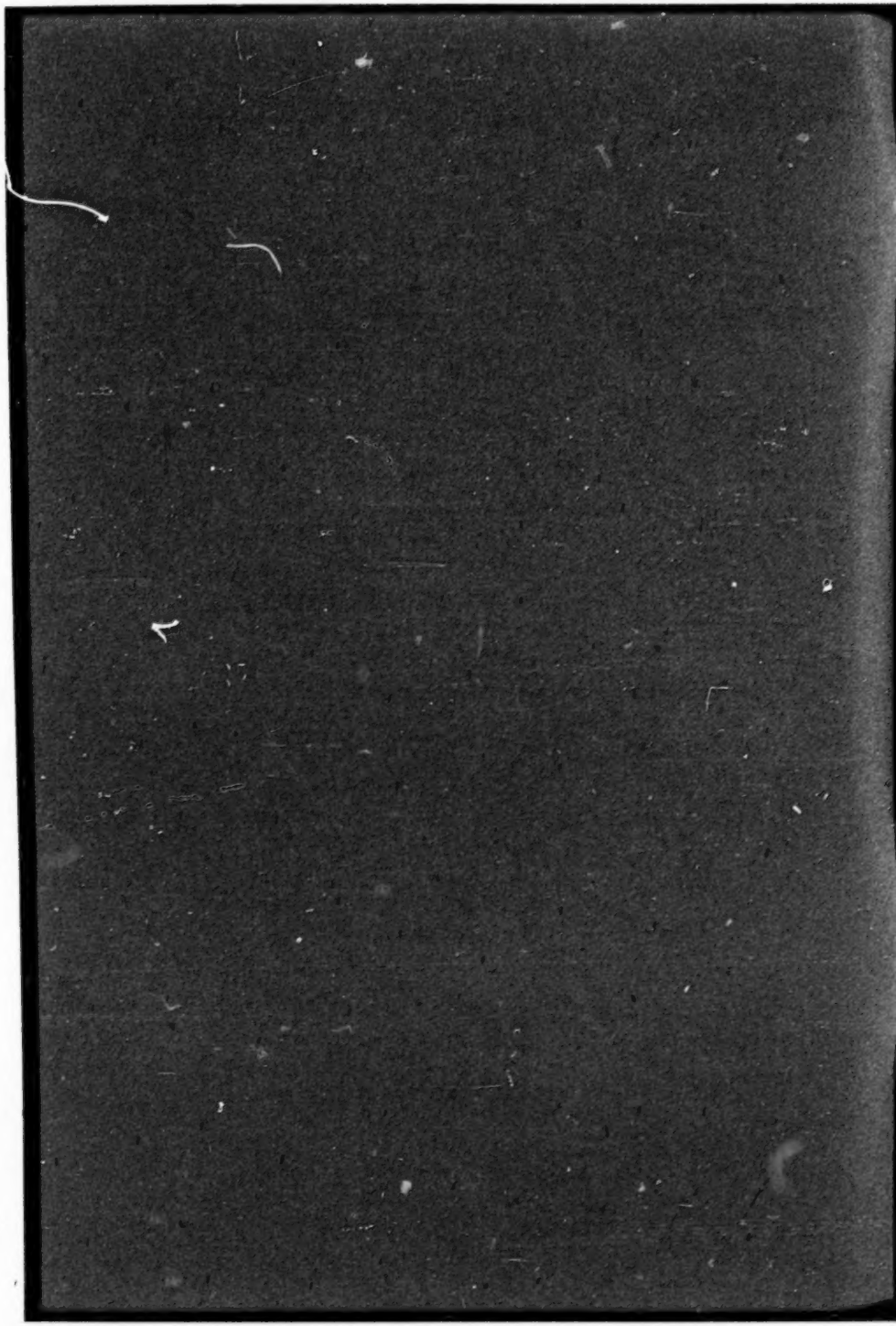
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF LIBERTY LOBBY, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION OF RICHARD B. COTTEN, FOR WRIT OF CERTIORARI.

GRANT R. SYKES
5001 Seminary Road
Alexandria, Virginia 22311
Attorney for Liberty Lobby

Washington, D.C. • ULD PUBLISHERS • LAW PRINTERS CO. • (202) 269-0320



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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF LIBERTY LOBBY, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION OF RICHARD B. COTTON, FOR WRIT OF CERTIORARI.

With consent of the parties, Liberty Lobby respectfully submits this brief as *amicus curiae* in support of the petitioner.

INTEREST OF THE AMICUS CURIAE

Liberty Lobby is a non-profit citizens' association organized under the laws of the District of Columbia. It was established in 1960 to speak for and to protect the interests and liberties of patriotic citizens of the United States from pressure groups working in opposition to the public interest. It is composed of approximately 23,000 Board of Policy members, (substantial financial supporters, who participate in policy,) plus many tens of thousands of subscribers to its monthly legislative report. Approximately a quarter million Americans are estimated to read the monthly publication "Liberty Letter." Members and subscribers are located throughout the United States. They thereby represent a significant strata of the nation's citizenry and electorate.

This case involves the issue of whether or not, under the constitution and laws of the United States, citizens and taxpayers have the right to challenge in the courts, alleged unlawful actions by administrative officials and functionaries that result in significant harm to, and sorely aggrieve, said citizens and taxpayers. The decision of the United States Fourth Circuit Court of Appeals, if left standing, will in the view of Liberty Lobby, fundamentally alter and denigrate the historic right of citizens, granted to them in the Bill of Rights, to challenge unlawful actions by public officials. Such a result would constitute a drastic loss of liberty, and would be wholly repugnant to all men who cherish freedom.

Accordingly, Liberty Lobby has a proper interest in the resolution of the issues before the Court in this case.

ARGUMENT

I.

THE PRESENT CASE INVOLVES A SIGNIFICANT INTERPRETATION OF THE LAW OF STANDING AS IT AFFECTS THE RIGHT OF CITIZENS AND TAXPAYERS TO CHALLENGE UNLAWFUL ACTIONS BY PUBLIC OFFICIALS.

The standing issue presented by this case may not be mooted by the passage of any statute. The right of a citizen to challenge in the courts an unlawful misuse of government property is inherent under the property clause of the Fifth Amendment to the United States constitution. It is abundantly clear that, if citizens are barred by the doctrine of standing from proceeding with this action, no authoritative and binding determination will ever be made of whether or not the provisions of the Foreign Military Sales Act of 1968,[1] relied upon by respondent, do in fact empower him to transfer to Israel, by sale or otherwise, defense articles procured with monies appropriated solely "for the use of the Armed Forces of the United States."[2] If U.S.

[1] Title 22 U.S.C. 2761.

[2] Many of the items transferred to Israel by the Secretary were items procured with monies provided under the then current U.S. Armed Forces Military Appropriations Act, P.L. 93-155 which reads:

> TITLE I – Procurement
>
> Sec. 101. Funds are hereby authorized to be appropriated during the Fiscal Year 1974 *for the use of the Armed Forces of the United States* . . . (Emphasis added.)

citizens, many of whom are active, reserve and retired members of the Armed Forces and of the Militia, cannot obtain judicial review of an official's unlawful disposition of essential defense articles, then as a practical matter no one can. An esteemed and cherished member of this honorable Court has held:

> . . . the role of the federal courts is . . . to protect the individual against prohibited conduct by the other two branches of the Federal Government . . .
>
> With the growing complexities of government (the judiciary) is often the one and only place where effective relief can be obtained . . . where wrongs to individuals are done by violations of specific guarantees, it is abdication for courts to close their doors.
>
> . . . (the individual) faces a formidable opponent in government, even when he is endowed with funds and with courage.
>
> I would not be niggardly therefore in giving private attorneys general standing to sue.[3]

We submit, any taxpayer who asserts that he is adversely affected and aggrieved by an illegal public act has standing to sue, not only in his own behalf, but on behalf of the public as well.[4] No confrontation between different branches of the Government is involved when a court interprets a statute. It is the constitutional duty

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[3] Justice Douglas, *Flast v. Cohen*, 392 U.S. 83 (1968).

[4] K.C. Davis, "Standing-taxpayers and others," *University of Chicago Law Review*, Vol. 35:601ff. (1968) esp, at p.-632-633. See cases cited therein. Professor Davis, the foremost legal scholar on the law of standing, criticizes current ambiguities and illogicalities in the law in need of clarification. This case hopefully offers an opportunity to resolve the ambiguities.

of the judiciary, when asked by a proper party, to examine, to review, to clarify, and to uphold the law. This honorable court should forestall attempts to extend the doctrine of standing beyond the bounds of reason through resourceful, yet shallow, rationalization. This Court should be on guard that the doctrine of standing not be used as a cloak behind which to hide judicial bias and lack of objectivity. No instrument, we submit, more readily lends itself to judicial manipulation, than an ambiguous standing doctrine. With it courts are enabled to select and choose from among citizens challenging the execution of the laws, those favoring their own bent or conforming to a court's own standard of ideological comportment. It is not the granting, but the denial, of standing which should be feared as a judicial excess. It is the fear of an alert citizenry, not the fear of intrusion on legislative and executive prerogatives, that has in the past led to the outrageous ambiguities, vain illogic, and the insufferable indignities of an uncertain standing doctrine. The doctrine of standing, when used, as it has been in this case, to bar citizen access to the courts to contest illegal state action, becomes an instrument of tyranny, not of law. It offers a feeble excuse to support a court's failure to judge an issue of law on its merits. The standing doctrine should provide no court with an excuse to ignore clear violation of statute.

II.

THE LOWER COURT ERRED IN FAILING TO REVIEW THE FOREIGN MILITARY SALES ACT OF 1968.

This Honorable Court may choose to limit its review to the standing question, but we submit that the issue of statutory interpretation is inextricably interwoven with the standing question.

When a citizen asserts that his rights have been violated by a public official's illegal act, the court is under a duty to review the statute to determine if, in fact, the citizen has been adversely affected or aggrieved within the meaning of any statute.[5] If so, then the citizen has standing. A citizen is drawn before the court in a cart. But, a statute, any statute, is the horse which pulls him into court. The horse, as the old saying goes, must come first. Hence, in a case such as this, a review of the statute is perforce, unavoidable.

Where a citizen and taxpayer brings a class suit in his capacity as a private attorney general, and the alleged violation of statute is clear, the court must grant standing. If the challenged action is one reasonably within the discretion of the executive, the Court, barring constitutional objections, should then regard the question posed as political, and standing should be denied.

Attempts by federal executives to exceed the limited powers granted to them by statute and by the

---

[5] K.C. Davis, *op.cit.* Espec. discussion of the Administrative Procedure Act with historical references and citations, p. 633.

constitution must be jealously guarded against by a people that loves liberty. Unlawful acts by public officials are void, and in law, should not be acts at all. When a court fails to enjoin the unauthorized act of a federal agent, a presumption may arise that the court has approved the act. Life is thus infused into an illegal act, deriving from the power of the court to approve, rather than from the official who lacked the power to act. A court should never permit its imprimatur to dignify the unlawful act of a federal official acting in defiance of statutory authority. The doctrine of judicial restraint has no reasonable nor constitutional application in such a situation and should be foresworn.

III.

THE SECRETARY OF DEFENSE LACKS CONSTITUTIONAL AUTHORITY TO MAKE SALES OF ACTIVE DUTY AND RESERVE ARMED FORCES DEFENSE ARTICLES TO FOREIGN NATIONS WITHOUT SPECIFIC STATUTORY AUTHORITY.

Article IV, Section 3, Clause 2 of the Constitution grants Congress the sole power "to dispose of and make all needful Rules and Regulations respecting . . . property belonging to the United States." It is well settled that this is a very broad and unlimited power, *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92 (1872), which cannot be usurped by any Federal officer, *United States v. Nicoll*, 27 Fed. cas. 149 (No. 15879) (C.C. N.Y. 1926) and by rules of the courts, *United States v. California*, 332 U.S. 19 (1947). Congress is not deprived

of its power to dispose of government property because such property is held by the Government for the benefit of all its citizens. *United States v. California,* supra; *United States v. City of Columbus,* 180 F. Supp. 775 (S.D. Ohio, 1959). Whether or not Government property should be disposed of involves complex "economic, technological, and philosophical considerations." See *Honchok v. Hardin,* 326 F. Supp. 988, 993-994 (DCMD. 1971), which the framers of the Constitution decided are best made by elected representatives.

It is also clear, that:

1) Full power of legislation in the matter of increase and reduction of the Armed Forces is with Congress. *Street v. United States,* 1890, 10 S. Ct. 309, 133 U.S. 307, 33 L. Ed. 631.

2) Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power. *United States v. Allegheny County,* Pa. 1944 64 S. Ct. 908, 322 U.S. 174, 88 L. Ed. 1209.

A citizen's interest in deprivation of rights in government property is recognized by the Constitution of the United States under the Fifth Amendment right to due process of law. *Booth v. General Dynamics Corp.* 264 F. Supp. 465 at 471. (1967) "Congress may not destroy constitutionally protected property rights by the expedient of withdrawing jurisdiction from every court in which suits for enforcement could be brought." *Miller v. Howe Sound Mining Co.*, D.C. Wash. 1948, 77 F. Supp. 540.

IV.

CONGRESS DID NOT AUTHORIZE THE SECRETARY, PURSUANT TO TITLE 22, SEC. 2761 TO SELL DEFENSE ARTICLES BELONGING TO, AND USED BY, THE ACTIVE AND RESERVE ARMED FORCES OF THE UNITED STATES.

Some 1000 late model M60 tanks – an equivalent of three years production – were airlifted out of U.S. Army NATO military depots in West Germany and flown to the Middle East for use against Arab nations who were then friendly to the United States and other NATO powers. What was given away in a few weeks has not been replaced as American industry is unable to manufacture castings to expand production. A large number of F-4 fighter aircraft, M-48 tanks, and nearly one-half the highly sophisticated TOW anti-tank missiles were also airlifted together with many other weapons essential to the tactical and strategic readiness of the United States Armed Forces.

Nowhere, from a fair reading of the provisions of the Foreign Military Sales Act of 1968, the provisions of Titles 10, 22, 31, 50 or elsewhere in the United States Code, is the Secretary of Defense authorized to "sell" to Israel or to any other foreign government, any defense articles other than those that are excess to the needs of the United States Armed Forces. Any other interpretation of the Foreign Military Sales Act is obviously absurd. It is a flagrant misinterpretation of law, so preposterous in its result as hardly to be born of reason.

Respondent's contention has always been that the term "stocks" as used in Title 22, United States Code,

Section 2761, includes "items of inventory procured for the active and reserve units of the United States Armed Forces."[6] This follows, he reasons, because, "a reading of the term 'defense articles' shows no restriction on where the items therein enumerated are to be obtained."[7] Title 22 United States Code, Section 2311(a) is then cited to show that:

> The President is authorized to furnish, military assistance, on such terms and conditions as he may determine, to any friendly country or international organization, the assisting of which the President finds will strengthen the security of the United States and promote world peace and which is otherwise elegible to receive such assistance by –
>
> (1) acquiring from *any source* and providing (by loan or grant) any defense articles or defense service . . .[8] (Emphasis added by petitioner.)

"It is therefore clear," respondent concludes, "that military sales are unrestricted by virtue of the terms 'any defense article' and 'from any source'." (Emphasis added by Petitioner)[9]

Petitioner, on the other hand has maintained – that Section 2761, is encompassed in, and must be defined in, the context of the statutory scheme applicable to

---

[6]See Appendix A which reproduces Respondent's final argument on the statutory question as it was presented to the United States Court of Appeals. References to Title 22 United States Code, Sections 2761, 2403(d), 2403(g), (2403(m)(2) and 2311(a) are also reproduced therein.

[7]Appendix A. P. 2.

[8]Id.

[9]Id., 3.

Foreign Military Assistance Programs, of which Foreign Military Sales are only a part. Section 1 of the Foreign Military Sales Act specifies that all sales under the act "be approved only when they are *consistent with* the foreign policy interests of the United States, (and) *the purposes of the foreign assistance program as embodied in the Foreign Assistance Act of 1961.*"[10] Obviously, for a sale to be consistent with the purposes of the foreign assistance programs as embodied in the Foreign Assistance Act there must be a specific legislative appropriation. Where specific Congressional authority or an appropriation of funds is lacking, none may be implied. This is essential to assure that Government property will not be misapplied.

> If appropriations are not used for the particular work designated by Congress they cannot be used for any other purpose.[11]

It would be utterly futile of Congress to legislate for, and to appropriate funds separately for (1) foreign military assistance and (2) the United States Armed Forces, if a civilian executive could, without other Congressional authorization, and contrary to the advice of high military authorities, apply the weapons procured for the U.S. Armed Forces to Foreign Assistance. It must not be presumed that Congress intends to legislate futility.

All kinds of defense articles (with specific limited exceptions, i.e., nuclear, etc.) may be sold to friendly foreign states pursuant to the Foreign Military Sales Act, but it breaches the bounds of reason to hold that

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[10]22 U.S.C. 2751. (Emphasis added by Petitioner.)

[11]21 Op. Attny. Gen. 414 (1876.)

the mere use of the term "any defense article" may be expanded to encompass "*all* of the defense articles of the United States." (Emphasis added.)

It is absurd to suggest that a civilian official, on his own authority alone, guided only by political considerations of a most partisan nature, may if he chooses, make sales to a foreign power of each and every weapon in the United States arsenal, without limitation or stricture of any kind; and, absent a declaration of war, or other hostile act, or a treaty of alliance; and, in the process to lay bare, not only the defensive readiness of the United States, but of the NATO allies! Does not the Constitution compel, and do not the people have a right to expect, more diligence of the Congress?

Manifestly, the term 'source' as used in Section 2311(a)[12] relates back to source of manufacture, source of origin. There is no express authority (apart from very specific and very limited provisions in Title 10 of the United States Code) that authorize transfers or loans of Armed Forces defense articles to foreign powers.

Respondent's conclusion that what Congress has not specifically forbidden, it has authorized, is without merit. The law is just the reverse. Title 31 of the United States Code provides:

> *Sec. 628. Application of Moneys appropriated.*
>
> Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.

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[12]Appendix A.

Sec. 665. Appropriations – Expenditure or contract obligations in excess of funds prohibited.

(a) No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

Respondent apparently finds statutory support to justify "Cash" sales of Armed Forces defense articles in Title 22, United States Code, Section 2403(m)(2)[13]

Petitioner submits that the "nonexcess defense articles" referred to in the above cited clause obviously refer to defense articles carried in inventory for use in the foreign assistance programs. A defense article procured for, or held for, military assistance obviously is "nonexcess" to Department of Defense needs. But, 'nonexcess' clearly is not the same thing as "stocks" containing items of inventory procured for the active and reserve forces, or that are held in the mobilization reserve of the United States Government.

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[13]Appendix A p. 3.

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari should be granted; the judgment of the District Court should be reversed; and the Secretary enjoined from making further illegal "sales" of defense articles. In the alternative, the case should be remanded to the District Court for a new hearing before a different judge.

Respectfully submitted,

GRANT R. SYKES
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Attorney for Liberty Lobby, Amicus Curiae

APPENDIX A

III

THE TERM "STOCKS" IN TITLE 22, UNITED STATES CODE, SECTION 2761 DOES ENCOMPASS ITEMS OF INVENTORY PROCURED FOR THE ACTIVE AND RESERVE UNITS OF THE UNITED STATES ARMED FORCES.

Title 22, United States Code, Section 2761 provides that:

> "The President may sell defense articles from the stocks of the Department of Defense and defense services of the Department of Defense to any friendly country or international organization if such country or international organization agrees to pay not less than the value thereof in United States dollars. . . "

Executive Order No. 11501 (December 22, 1969), 34 F.R. 20169, as amended by Executive Order No. 11685 (September 25, 1972), 37 F.R. 20155, delegates the President's powers under this section to the Secretary of Defense.

The Appellant has not cited any section that defines "stocks" as being restricted in definition to military material in excess of that assigned to the inventory of active and reserve units of the United States Armed Forces. Instead, the Appellant, through a rather tortured reasoning process, attempts to take certain definitions pertaining to value and then arrive at a definition of the term "stocks". Yet, he goes about this the wrong way. Stock should be given its obvious meaning, namely a store or supply. The real crux of this issue is what is the meaning of "defense articles" which the President may sell

from the stocks of the Department of Defense pursuant to Title 22, United States Code, §2761. "Defense article" is defined in Title 22, United States Code, §2403 (d) as follows:

> " 'Defense article' includes —
> (1) any weapon, weapons system, munition, aircraft, vessel, boat, or other implement of war;
> (2) any property, installation, commodity, material, equipment, supply, or goods used for the purposes of furnishing military assistance;
> (3) any machinery, facility, tool, material, supply, or other item necessary for the manufacture, production, processing, repair, servicing, storage, construction, transportation, operation, or use of any article listed in this subsection; or
> (4) any component or part of any article listed in this subsection; . . . "

"Excess defense article" is defined in Title 22, United States Code, §2403(g).

Had Congress intended that only excess defense articles should be sold, it would have so stated in Title 22, United States Code, §2761 and not used the term "defense articles". A reading of the term "defense articles" shows no restriction on where the items therein enumerated are to be obtained. The definitions contained in Title 22, United States Code, §2403 are not used to restrict the sale or provision of defense articles to other nations but merely to establish the value at which such articles may be determined for purposes of accounting. Title 22, United States Code, Section 2311 (a) provides in pertinent part:

"The President is authorized to furnish military assistance, on such terms and conditions as he may determine, to any friendly country or international organization, the assisting of which the President finds will strengthen the security of the United States and promote world peace and which is otherwise eligible to receive such assistance by—

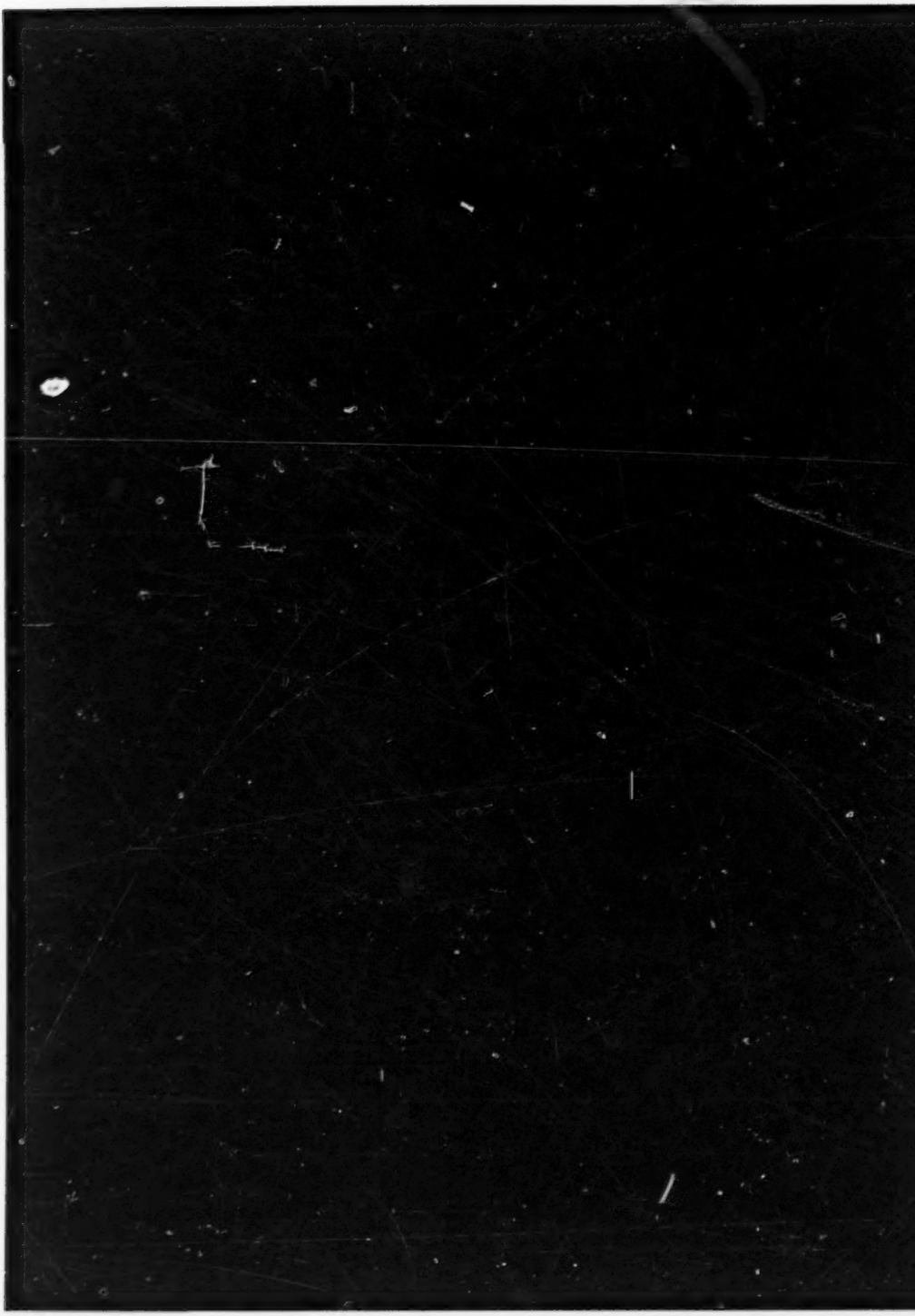
(1) *acquiring from any source and providing (by loan or grant) any defense article or defense service . . .*" [emphasis added]

It is therefore clear that military sales are unrestricted by virtue of the terms "any defense article" and "from any source."

Furthermore, value is defined in Title 22, United States Code, §2403 (m) (2) as follows:

"[W]ith respect to a nonexcess defense article delivered from inventory to foreign countries or international organizations under this chapter, the acquisition cost to the United States Government, adjusted as appropriate for condition and market value;"

Nowhere is there any mention of such articles being dropped from inventory and accordingly Appellant's reliance on this subsection is misplaced. In fact that definition of value clearly contemplates that articles will be delivered from the inventory of items assigned to active and reserve units of the Armed Forces.



In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1276

RICHARD B. COTTEN, PETITIONER

v.

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioner, suing as taxpayer and citizen, brought this suit for injunctive and declaratory relief against the transfer of military materiel by the Secretary of Defense to the State of Israel.[1] Petitioner alleges that the sale of arms to Israel was "contrary to both statute and the constitution" (Pet. 4).[2]

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[1]William Pierce, the Committee to Restore the Constitution, Inc., and the Action Committee on Arab-American Relations also were plaintiffs in the district court. However, they did not appeal to the court of appeals from the dismissal of the complaint by the district court and, accordingly, they are not parties before this Court.

[2]The government argued in the district court that the transfer was authorized by 22 U.S.C. 2761, which provides:

> The President may sell defense articles from the stocks of the Department of Defense and defense services of the Department of

The district court dismissed the complaint, holding that petitioner lacked standing to maintain the action (Pet. App. A). The Court of Appeals for the Fourth Circuit affirmed *per curiam* (Pet. App. B).

2. Petitioner rather plainly lacks standing to sue. He has failed to meet the two-pronged test for taxpayer standing set out in *Flast* v. *Cohen*, 392 U.S. 83, 102-103, and reiterated in *United States* v. *Richardson*, 418 U.S. 166, 173, and *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 228. This test requires (1) a challenge to a law enacted under the taxing and spending clause, Article I, Section 8 of the Constitution, and (2) a claim that the law violates specific constitutional limitations imposed on the taxing and spending power. Petitioner makes neither allegation.

Nor has petitioner demonstrated the "personal stake in the outcome of the controversy" necessary to confer "citizen" standing. Petitioner has alleged no stake in the outcome of this case not shared by citizens in common. See, *e.g.*, *United States* v. *Richardson*, *supra*, 418 U.S. at 177-

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Defense to any friendly country or international organization if such country or international organization agrees to pay not less than the value thereof in United States dollars. Payment shall be made in advance or, as determined by the President to be in the best interests of the United States, within a reasonable period not to exceed one hundred and twenty days after the delivery of the defense articles or the rendering of the defense services.

Subsequent to the filing of the complaint, the Emergency Security Assistance Act of 1973, Pub. L. 93-199, 87 Stat. 836, which specifically authorizes $2,200,000,000 to be appropriated for "emergency military assistance or foreign military sales credits, or for both as the President may determine, for Israel," was enacted. The district court properly concluded that this law put to rest any question concerning the legality of the transfer of military materiel to Israel (Pet. App. 2a).

180; *Schlesinger* v. *Reservists to Stop the War, supra*, 418 U.S. at 226-227; *Baker* v. *Carr*, 369 U.S. 186, 204. Rather, as the district court noted, petitioner seeks to employ the judiciary as a forum "to vent the disagreement with the programs which are being conducted by the Congress" (Pet. App. 3a). This desire is not a basis for standing. *United States* v. *Richardson, supra*, 418 U.S. at 175; *Flast* v. *Cohen, supra*, 392 U.S. at 106.[3]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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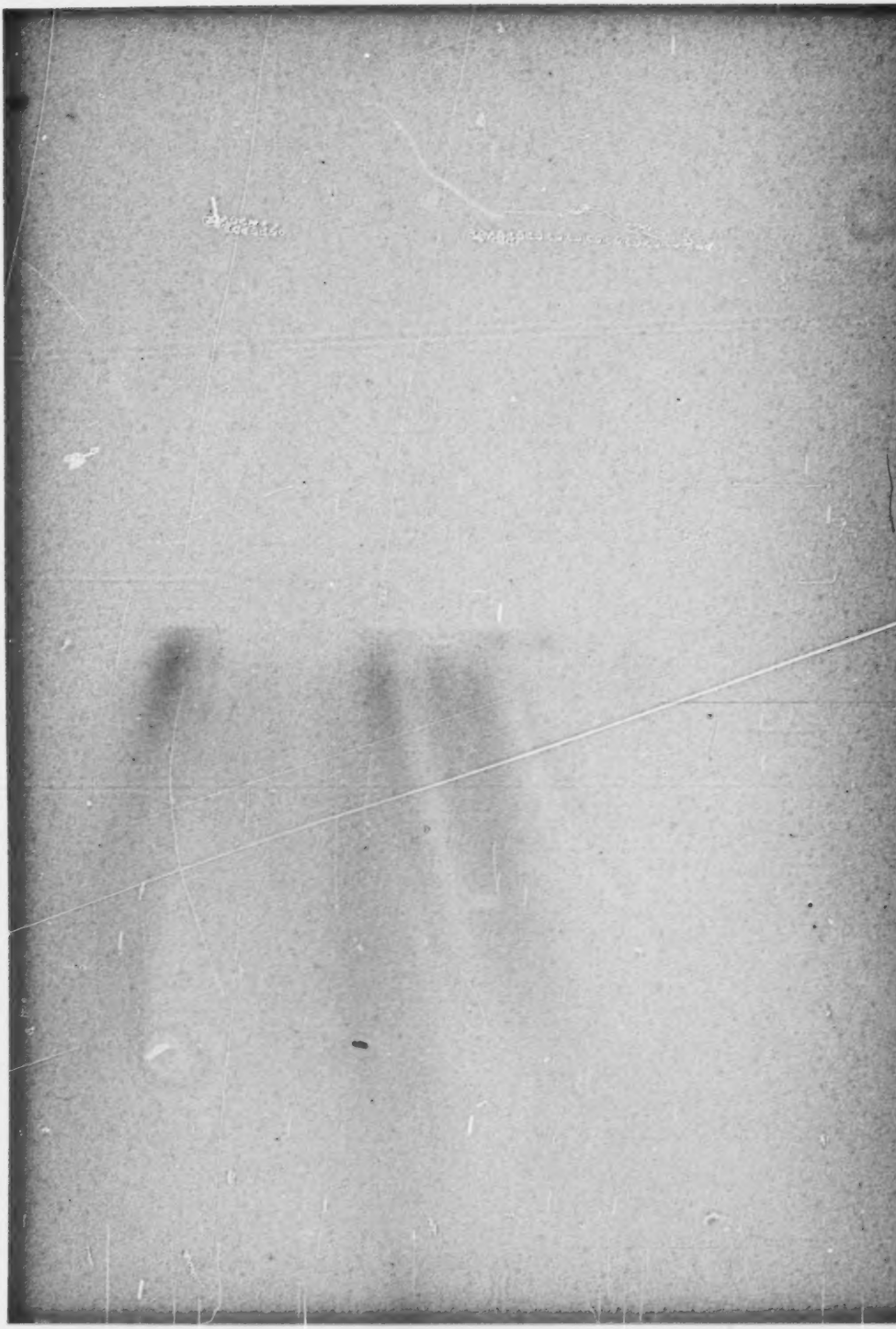
[3]Petitioner's contention that the district judge should have recused himself is without merit. The only ground alleged to show personal bias is the court's rulings against petitioner's position. Since the district court's decision is correct, it hardly demonstrates personal bias against petitioner.



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Respondent.

ON PETITION FOR A WRIT OF
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COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION BY AMERICANS FOR MIDDLE EAST NEUTRALITY FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER, RICHARD B. COTTEN, FOR WRIT OF *CERTIORARI.*

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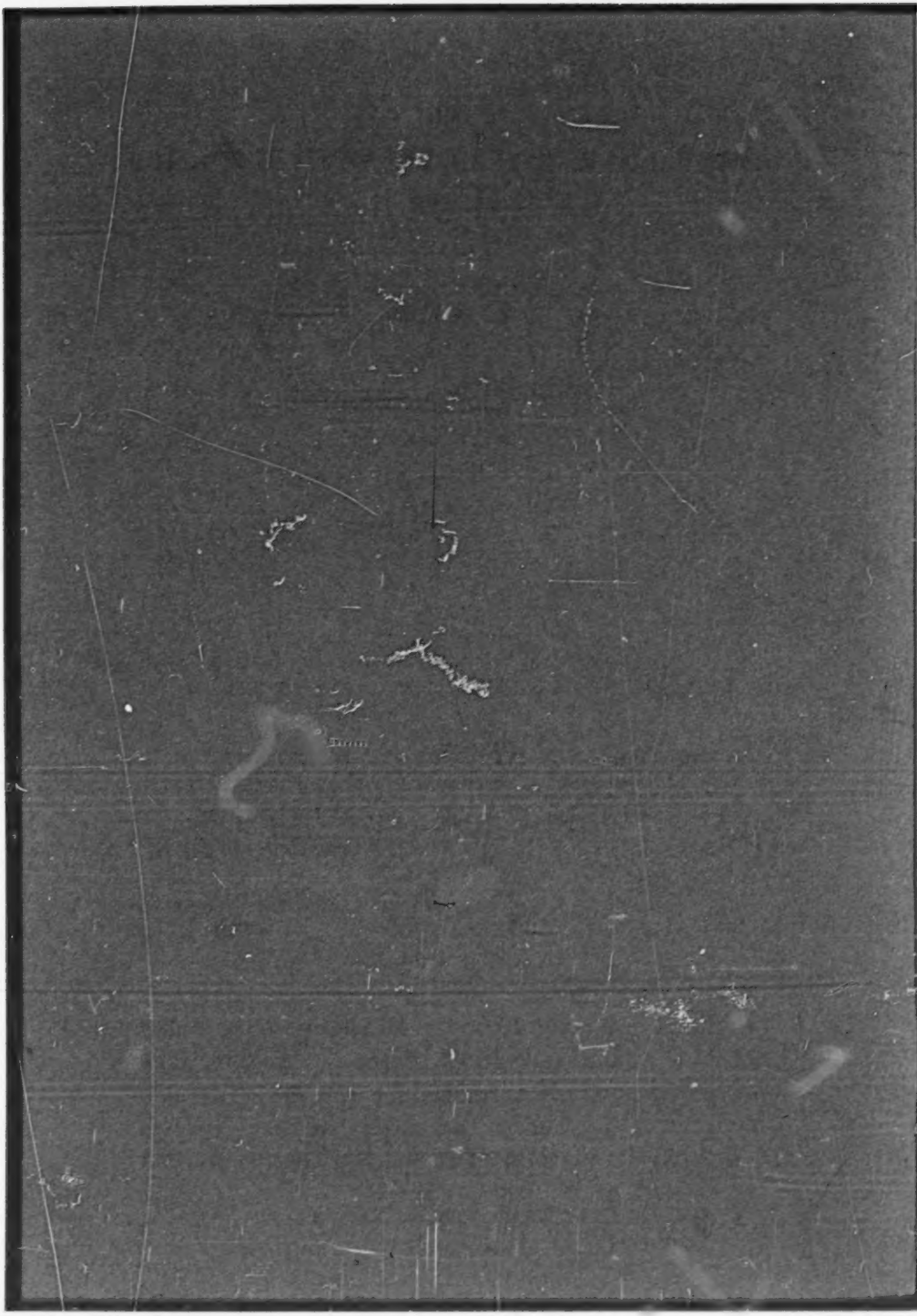

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Comes now, Americans for Middle East Neutrality (AMEN) © and respectfully moves for leave to file a brief as *amicus curiae* in support of the Petitioner. Consent to appear as *amicus curiae* has been obtained from Richard B. Cotten. The Solicitor General will not

consent to the filing of a brief in support of the Petition for a Writ of Certiorari because it is not timely made.[1]

INTEREST OF THE AMICUS CURIAE

Americans for Middle East Neutrality (AMEN)© is a newly organized, unincorporated citizens association located at 4607 Franklin Avenue, Wilmington, North Carolina 28401. It consists at the present time of 55 business and professional people, mostly resident in and near Wilmington, North Carolina. The group was formed to do what it could in a small way to sway public and Congressional opinion against the dangerous and unlawful course being pursued by the Administration in the Middle East. Wilmington citizens located near the Sunnypoint Military Ocean Terminal observe ships constantly being loaded with U.S. armed forces military material headed for the Middle East under a cover of secrecy and military security. Alarmed at the indifference of Congress to the unlawful transfers of military material, members of AMEN discussed the feasibility of bringing a law suit in the local courts, when they read of the action of Liberty Lobby as *amicus curiae* in the instant case. After making inquiries, it was decided that participation by the group in support of the Petitioner, Richard B. Cotten, by

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[1] The office of Solicitor General has verbally agreed to consent to the filing of a brief by Americans for Middle East Neutrality, on the merits, conditional upon the Petition for a Writ of Certiorari being granted.

means of a brief as *amicus curiae* would be an appropriate course of action.

Accordingly, as a group of citizens sorely aggrieved by unlawful and unconstitutional actions by federal officials acting under color of, but in defiance of statute, Americans for Middle East Neutrality submits that it has a proper interest in the resolution of the issues before the Court in this case.

IN THE ALTERNATIVE, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

The standing issue presented by this case has been ably argued by both Petitioner and Liberty Lobby as *amicus curiae*. It is submitted that the perfunctory Answer by the United States is an evasion of the issue. The three cases cited by the United States in its Answer are entirely inappropriate, misapplied and easily distinguishable.[2] The mootness question, again raised by the United States, was adequately disposed of in Petitioner's brief.[3]

Americans for Middle East Neutrality desire to offer argument relative to the legal and historic background of the Middle East situation, including detailed argument with respect to official United States actions and positions taken in law and before the United

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[2] *Flast v. Cohen*, 392 U.S. 83, 102-103, *United States v. Richardson*, 418 U.S. 166, 173 and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 228.

[3] Petition for Writ of Certiorari, p. 8

Nations, which are effectively being sabotaged by a subtle and secret strategy ostensibly guided by highly placed officials.

Americans for Middle East Neutrality further submit that the Administration's continuing unlawful military intervention in the Middle East is unjustified in view of the official United States, United Nations, and Soviet positions, which, on their face, are identical.[4]

CONCLUSION

For the foregoing reasons, and in order to present additional argument on behalf of the Americans for Middle East Neutrality, the Court is urged to grant this motion. In the alternative, the Court is strongly urged to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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Attorney for Americans for Middle East Neutrality

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[4] "Last month, Gromyko spoke of 'strict guarantees' for Israeli security if it would adhere to the 'path of Peace'. Now the Soviet position is again that Israel must first recognize the right of Palestinians to a separate state if it wants sufficient assurances for its own security. "Soviet effort to Renew Mideast Talks at Impasse." *The Washington Post*, Sunday, May 18, 1975, Page A-18.